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March 18, 2015

By ECF

The Honorable Denise L. Cote,  
United States District Judge,  
Daniel Patrick Moynihan United States Courthouse,  
500 Pearl Street, Room 1610,  
New York, New York 10007-1312.

Re: FHFA v. Nomura Holding America, Inc., et al., 11 Civ. 6201 (S.D.N.Y.)

Dear Judge Cote:

On March 11, 2015, plaintiff submitted a “proposed trial schedule” and witness sequence to the Court. (3/11/15 Letter, Dkt. 1416, at 1-2.) Plaintiff has never revised that schedule or informed defendants of any intent to do so. At the close of proceedings yesterday, the Court asked the parties to “jointly share with my staff who you expect to testify tomorrow.” (Ex. A (3/17/2015 Tr.) at 411:2.) Accordingly, the parties together reported to your Honor’s law clerk that the following witnesses would appear today: Lee Kennedy, William Schall, Jerry Hausman, and Hans Isakson. The parties also reported that Charles Cipione, and then David Mishol, would be called in any remaining time this afternoon.

At 10:18 p.m. last night, counsel for plaintiff sent an email stating that “[i]f time permits, Mr. Hunter’s testimony will begin tomorrow afternoon”—that is, this afternoon. (Ex. B (3/17/15 E-mail from Andrew Dunlap).) This gamesmanship should not be permitted. As the Court remarked at the final pretrial conference, “[w]e are all going to have notice,” and “[t]here are no surprises in this case, or, if there are, there are going to be few.” (Ex. C (3/9/15 Tr.) at 7:12-15; *see also id.* at 9:7-10 (“I think we all need plenty of time to prepare and so notice. I would like to know what a coming week’s testimony concerns . . .”).) It would be highly unfair to allow plaintiff to revise its order of witnesses with less than 24 hours’ notice to defendants and the Court. Defendants ask that the witnesses appear in the order proposed by plaintiff and agreed as recently as yesterday afternoon by the parties: Lee Kennedy, William Schall, Hans Isakson, Jerry Hausman, Charles Cipione, and David Mishol (with two appraisers, Lee Claggett and Dan Platt, appearing on Thursday morning).

Respectfully submitted,

/s/ David B. Tulchin

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